92-838

Supreme Court, U.S.
FILED
AUG 10 1992
OFFICE OF THE CLERK

NO._____ - _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LARRY BALIDOY BALIGAD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH COURT

PETITION FOR WRIT OF CERTIORARI

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35-1

QUESTION PRESENTED FOR REVIEW

Can a defendant receive a ten-year mandatory minimum term of imprisonment pursuant to 21 U.S.C. § 841(b)(1)(A)(viii) on the basis of the net weight of pure methamphetamine within a mixture or substance containing methamphetamine?

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REFERENCE TO THE OPINION OF THE NINTH CIRCUIT COURT OF APPEALS

The Ninth Circuit Court of Appeals filed its opinion in this case on January 16, 1992: United States v. Baligad, C.A. No.90-010286 (9th Cir. Jan. 16, 1992). A copy of the Ninth Circuit's opinion is attached hereto as Appendix A.

STATEMENT OF JURISDICTION

The district court had original jurisdiction over this case pursuant to 18 U.S.C. § 3231. The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The Ninth Circuit's opinion was filed on January 16, 1992 [Appendix A, attached hereto], the Ninth Circuit's order denying a rehearing and rejecting a suggestion for rehearing en banc was filed on May 11, 1992 [Appendix B, attached hereto], and the Ninth Circuit's judgment was filed on May 26, 1992. [Appendix C, attached hereto] Pursuant to 28 U.S.C. § 1254(1), this Court

has jurisdiction to review the judgment challenged by this petition for writ of certiorari.

STATUTE INVOLVED

The statute construed in this case is 21 U.S.C. § 841(b)(1)(A)(viii), which states in pertinent part:

> (b) Except as otherwise provided in section 859, 860 or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1)(A) In the case of violation of subsection (a) of this section involving --
>
> * * *
>
> (viii) 100 grams or more of methamphetamine, its sales, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;
>
> such person shall be sentenced to a term of imprisonment which may not be less than 10 years . . . .

STATEMENT OF THE CASE

Defendant-Petitioner LARRY BALIDOY BALIGAD was convicted, inter alia, of conspiring to possess with intent to distribute crystal methamphetamine in violation of 21 U.S.C. § 846 (Count II) and possessing with intent to distribute crystal methamphetamine in violation of 21 U.S.C. § 841(a)(1) (Count IV). Both offenses involved approximately 900 grams of a mixture or substance that contained less than 780 grams of crystal methamphetamine. The district court sentenced BALIGAD to the ten-year mandatory minimum term of imprisonment provided for by 21 U.S.C. § 841(b)(1)(A)(viii), the pertinent text of which is set forth supra.

BALIGAD unsuccessfully argued in both the district court and the Ninth Circuit Court of Appeals that this statute's reference to "100 grams or more of metham-

phetamine" applied only to pure methamphetamine, not to the net weight of pure methamphetamine within a mixture or substance containing methamphetamine. The Ninth Circuit ruled:

> The district court did not err in sentencing Baligad. Because Baligad possessed a net amount of methamphetamine in excess of 100 grams, the court properly imposed the 10-year mandatory minimum sentence prescribed by 21 U.S.C. § 841(b)(1)(A)(viii). United States v. Alfeche, 942 F.2d 697, 698-99 (9th Cir. 1991).

[Appendix A, attached hereto, at 3-4 (emphasis in original)] In addition to United States v. Baligad and United States v. Alfeche, the Ninth Circuit has followed the same interpretation of 21 U.S.C. § 841(b)(1)(A)(viii) in United States v. Boling, 958 F.2d 378 (9th Cir. 1992) (mem. op., text in Westlaw), and United States v. Robichaud, 956 F.2d 1169 (9th Cir. 1992) (mem. op., text in Westlaw). The First Circuit Court of Appeals and the Fourth

Circuit Court of Appeals have also issued similar rulings. See United States v. Stoner, 927 F.2d 45 (1st Cir.), cert. denied, 112 S.Ct. 129 (1991), and United States v. Rusher, -- F.2d -- (4th Cir. June 3, 1992).

ARGUMENT

I. INTRODUCTION

Supreme Court Rule 10.1(c) states that this Court may grant a petition for a writ of certiorari when "a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court." The issue raised in the instant petition is of exceptional importance, because it affects mandatory minimum terms of imprisonment for numerous individuals who have been (or will be) convicted of methamphetamine offenses. The current interpretation of 21 U.S.C. § 841(b)(1)(A)(viii) has increased

(and will continue to increase) the mandatory minimum term of imprisonment for many defendants in methamphetamine cases from five to ten years. Because the same interpretation is applicable to 21 U.S.C. § 841(b)(1)(B)(viii), the parallel sentencing provision concerning smaller quantities of methamphetamine, the interpretation has sometimes resulted (and will continue to result) in the imposition of a five-year mandatory minimum term of imprisonment when no mandatory minimum term of imprisonment would otherwise be imposed.

Thus, the interpretation of the mandatory minimum sentencing statute by the Ninth Circuit, First Circuit and Fourth Circuit will have the effect of greatly increasing the terms of imprisonment for many defendants. For that reason, it is of critical importance that this Court settle the issue raised in this petition.

II. 21 U.S.C. § 841(b)(1)(A)(viii) IS, AT MINIMUM, AMBIGUOUS

The Ninth Circuit's opinion in BALIGAD's case ruled that the 10-year mandatory minimum sentence of 21 U.S.C. § 841(b)(1)(A)(viii) will be imposed as long as the net amount of methamphetamine in a mixture or substance containing methamphetamine is at least 100 grams.

However, several factors indicate that the discrete terms of "methamphetamine" and "a mixture or substance containing a detectable amount of methamphetamine" in the statute mean exactly what they say — pure methamphetamine versus a mixture or substance containing methamphetamine.

First, this Court recognizes that in statutory construction the language of the statute "must ordinarily be regarded as conclusive." Bread Political Action Committee v. FEC, 455 U.S. 577, 580 (1982); see

Burlington Northern R. Co. v. Oklahoma Tax Commission, 481 U.S. 454, 460 (1987). The language of § 841(b)(1)(A)(viii) does not mention a "net" weight approach. Rather, it expresses a clear dichotomy between 100 or more grams of pure methamphetamine and 1000 or more grams of a mixture or substance containing a detectable amount of methamphetamine. This Court will "assume that the legislative purpose is expressed by the ordinary meaning of the words used." American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982).

Second, in construing a statute, a court should "give significance to every word [and] phrase." In the Matter of Bobba, 736 F.2d 1317, 1320 (9th Cir. 1974). If Congress had intended that the 10-year mandatory minimum sentence should be imposed based upon the net amount of methamphetamine in a mixture or substance, there

would have been no need for Congress to specifically make the distinction in the statute between "methamphetamine" and "a mixture or substance" containing methamphetamine.[1] Congress readily could have stated in the statute that the net amount of methamphetamine was determinative, if Congress so desired. But, Congress did not do so, even though Congress thereby could have made the statute more concise.

Third, in Chapman v. United States, 500 U.S. --, 111 S.Ct. 1919 (1991), this Court construed 21 U.S.C. § 841(b)(1)(A)(viii) as setting up a clear dichotomy between "pure" methamphetamine and "a mixture or substance" containing methamphetamine.

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[1] In 21 U.S.C. §§ 841(b)(1)(A)(i), (ii), (iii), and (v), pertaining to contraband such as heroin, cocaine, coca leaves, cocaine base and LSD, Congress did not distinguish between pure and impure contraband. In these provisions, only the "mixture or substance" language is utilized.

Chapman concerned the issue of whether a defendant selling a "mixture or substance" containing a detectable amount of LSD should be sentenced under 21 U.S.C. § 841(b)(1)(B)(v) on the basis of the total weight of the blotter paper containing the LSD or on the basis of the net weight of the pure LSD within the blotter paper. 111 S. Ct. at 1922. This Court ruled that the statute mandated sentencing based on the total weight of the blotter paper, not on the net weight of the pure LSD within the blotter paper. Id. In the course of this Court's ruling, this Court pointed out:

> With respect to . . . methamphetamine, it [the sentencing statute] provides for a mandatory minimum sentence based either on the weight of a mixture or substance containing a detectable amount of the drug, or on lower weights of pure . . . methamphetamine . . . . Thus, with respect to [methamphetamine], Congress clearly distinguished between the pure drug and a 'mixture or substance containing a detectable amount of' the pure drug . . . . Congress knew how to

> indicate that the weight of the pure drug was to be used to determine the sentence . . . .

Id. at 1924 (emphasis in original).

Fourth, comparison of § 841(b)(1) with the Federal Sentencing Guidelines is instructive. The statutory provision, which became effective in November 1988, greatly increased the penalty for trafficking in methamphetamine under certain circumstances. While a Sentencing Guideline sentence for distributing 100 grams of methamphetamine in November 1988 would have otherwise resulted in a level 20 (33 to 41 months) sentence, the mandatory minimum term of 10 years superseded that Sentencing Guideline. In an apparent attempt to equalize or clarify this disparity between the Sentencing Guidelines and the mandatory minimum terms of § 841(b)(1), the Sentencing Guidelines were amended in 1989 and the terms "pure methamphetamine" and

"methamphetamine" were introduced. Comparing those Sentencing Guideline ranges for "pure methamphetamine" and "methamphetamine" with the five-year and 10-year mandatory minimum terms under § 841(b)(1) indicates a direct correlation between the terms "pure methamphetamine" as used in the Sentencing Guidelines, and "methamphetamine" as used in § 841(b)(1). A 121 to 151-month Sentencing Guideline is imposed for 100 to 300 grams of "pure methamphetamine," versus a 10-year mandatory minimum term for 100 grams of "methamphetamine," and a 63 to 78-month Sentencing Guideline is imposed for 10 to 40 grams of "pure methamphetamine," versus a five-year mandatory minimum term for 10 grams of "methamphetamine."

The current version of § 2D1.1 of the Sentencing Guidelines distinguishes between "methamphetamine" (defined as the

entire weight of a mixture or substance containing a detectable amount of methamphetamine), "methamphetamine (actual)" (defined as the weight of the methamphetamine contained within the mixture or substance), and "ice" (defined as a mixture or substance containing crystal methamphetamine of at least 80 percent purity). But, Congress has not amended § 841(b)(1) to refer to "ice" or "crystal methamphetamine," and nothing in the legislative history of § 841(b)(1) indicates that Congress considered this special type of methamphetamine or the "net" methamphetamine approach when enacting the statute.

Finally, the Ninth Circuit's Alfeche ruling was grounded on the premise that not utilizing the "net" methamphetamine approach would cause "absurd results." 942 F.2d at 698. For example, the court was concerned that "a person possessing hun-

dreds of grams of methamphetamine would avoid the 10-year minimum sentence if the methamphetamine was mixed with a few grams of something else." Id. However, even when the "net" methamphetamine approach is used for the "methamphetamine" prong of the statute, the statute still produces results that appear equally absurd. For example, while a person possessing 99 grams of pure methamphetamine would avoid the 10-year mandatory minimum sentence, a person possessing one kilogram of any substance containing just one-tenth of a gram of methamphetamine will receive the 10-year mandatory minimum sentence. Hence, using the "net" methamphetamine approach for the "methamphetamine" prong of the statute does not eliminate unreasonable application of the statute.

In conclusion, neither the statute nor its legislative history indicate that Congress intended to use the "net" metham-

phetamine approach or that Congress considered the special type of methamphetamine known as crystal methamphetamine or "ice." Thus, the statute is ambiguous.

III. 21 U.S.C. § 841(b)(1)(A)(viii) SHOULD BE CONSTRUED PURSUANT TO THE RULE OF LENITY

As discussed supra in Section II, 21 U.S.C. § 841(b)(1)(A)(viii) is, at minimum, ambiguous. This Court recognizes that the judiciary cannot re-write an ambiguous statute. "If corrective action is needed, it is Congress that must provide it." Busic v. United States, 446 U.S. 398, 405 (1980); see Bifulco v. United States, 447 U.S. 381, 401 (1980) ("it is for Congress, and not this Court, to enact the words that will produce the results the Government seeks in this case").

In the instant case, there is no indication in the statute or its legisla-

tive history that Congress considered crystal methamphetamine when drafting the statute, and the statute is ambiguous when applied to crystal methamphetamine offenses. Thus, it "is not for [the judiciary] to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated." Busic, 446 U.S. at 405 (quoting TVA v. Hill, 437 U.S. 153, 185 (1978)).

There is "longstanding recognition of the principle that 'ambiguity in a criminal statute should be resolved in favor of lenity."' Liparota v. United States, 471 U.S. 419, 427 (1985) (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)). The rule of lenity "serves to ensure that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability."

Crandon v. United States, 494 U.S. 152, 158 (1990). When a court has to choose between two interpretations of a criminal statute, "'it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" United States v. Bass, 404 U.S. 336, 347 (1971) (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952)).

The rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also the penalties they impose." Bifulco, 447 U.S. at 387. This Court will not "increase or multiply punishments absent a clear and definite legislative directive." Busic, 446 U.S. at 406-07. Thus, because 21 U.S.C. § 841(b)(1)(A)(viii) is ambiguous, this Court should choose the interpretation more favorable to defendants. See Bifulco,

447 U.S. at 387, 400 (rule of lenity commands that sentencing statute not be construed to impose special parole term on defendant); Busic, 446 U.S. at 406-07 (rule of lenity directs that sentencing statute not be construed to further enhance defendant's sentence for using a firearm while committing a felony); Whalen v. United States, 445 U.S. 684, 69495 (1980) (rule of lenity instructs that consecutive sentences not be imposed upon defendant); Simpson v. United States, 435 U.S. 6, 14-15 (1978) (rule of lenity necessitates that sentencing statute not be construed to further enhance defendant's sentence for committing bank robbery with a firearm).

IV. CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

DATED: Honolulu, Hawaii, August 8, 1992

Attorney for Petitioner
LARRY BALIDOY BALIGAD

APPENDIX A

OPINION OF THE
NINTH CIRCUIT COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

(Filed January 16, 1992)

UNITED STATES OF AMERICA,	)	No. 90-10286
	)	
Plaintiff-Appellee,	)	D.C. No.
	)	CR-89-01558-02
v.	)	
	)	MEMORANDUM*
LARRY BALIDOY BALIGAD,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the United States District Court

for the District of Hawaii

Spencer M. Williams, District Judge, Presiding

Arsued and Submitted December 12, 1991

San Francisco, California

Before: GOODWIN, SKOPIL, and NOONAN,

Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

The district court did not abuse its discretion in declining to sever Baligad's trial from that of his codefendant, Genoveva Asuncion, pursuant to Federal Rule of Criminal Procedure 14. Any unfair prejudice to Baligad from Asuncion's trial testimony concerning her subjective fear of the Baligad family was mitigated by the district court's limiting instruction to the jury. Baligad has not demonstrated that the joint trial was so "manifestly prejudicial" as to require the trial judge to order severance. See United States v. Sherlock, 865 F.2d 1069, 1078 (9th Cir. 1989).

Unlike the situation in Sherlock, where the government thrice flouted the court's limiting instruction in rebuttal, the prosecutor's remarks in Baligad's case regarding the torture and murder of a DEA agent in Mexico, while improper, did not cause Baligad to suffer manifest prejudice

by reinforcing Asuncion's testimony. First, the prosecutor did not refer directly to Asuncion's testimony about her fear of Baligad. Second, because Asuncion testified only to her subjective fear and did not provide a factual basis for her beliefs, her testimony did not tend to identify Baligad as a violent or dangerous person. Third, unlike the situation in Sherlock, Baligad had an opportunity to crossexamine Asuncion. For these reasons, we also hold that the district court did not abuse its discretion in denying Baligad's motion for a mistrial. United States v. Toomey, 764 F.2d 678, 681 (9th Cir. 1985), cert. denied, 474 U.S. 1069 (1986).

With respect to Baligad's claims of prosecutorial misconduct in closing, we agree that the prosecutor did engage in improper vouching. See United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980).

His comments praising the "integrity" of the agents and arguing that "we are not going to put on information that is not true" conveyed the message that all the government's evidence was accurate. Moreover, the prosecutor's reference to an NBC miniseries about "a DEA special agent in Mexico who had been kidnaped, tortured, and then killed by Mexican drug traffickers" was inflammatory and improper. The prosecutor went on to invoke the commentary of NBC news anchor Tom Brokaw lauding the efforts of DEA agents who were "out there protecting us."

The government's protestation notwithstanding, we do not condone these comments as a justifiable response to defense counsel's attacks on the credibility of the government's witnesses.

When considered in the context of the entire trial, however, the improper re-

marks and vouching did not impair "the jury's ability to judge the evidence fairly" and thus did not rise to the level of reversible error. United States v. Endicott, 803 F.2d 506, 513 (9th Cir. 1986). The prosecutor's reference to the miniseries was brief, did not refer directly to Baligad, and was made partially in response to the levity of defense counsel's closing argument.

It cannot be said that the prosecutor's vouching more likely than not affected the jury's verdict. Id. The jury had been instructed that the comments of attorneys were not evidence, and the government did not rely heavily on the credibility of the agents' reports in its case against Baligad. Rather, it relied on Baligad's presence at the Honolulu airport when Asuncion left for the Philippines and when she returned, and on the drug paraphernalia,

large sums of cash, and notes of drug transactions found in Baligad's possession.

The district court did not err in sentencing Baligad. Because Baligad possessed a net amount of methamphetamine in excess of 100 grams, the court properly imposed the 10-year mandatory minimum sentence prescribed by 21 U.S.C. § 841(b)(1)(A)(viii). United States v. Alfeche, 942 F.2d 697, 698-99 (9th Cir. 1991). Baligad's objection to the district court's denial of a "minor participant" departure under U.S.S.G. § 3B1.2(b) is therefore moot.

AFFIRMED

APPENDIX B

ORDER OF THE NINTH CIRCUIT COURT OF APPEALS DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

(Filed May 11, 1992)

UNITED STATES OF AMERICA,	)	No. 90-10286
	)	
Plaintiff-Appellee,	)	D.C. No.
	)	CR-89-01558-02
v.	)	
	)	ORDER
LARRY BALIDOY BALIGAD,	)	
	)	
Defendant-Appellant.	)	
	)	

Before: GOODWIN, SKOPIL, and NOONAN, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judge Noonan has voted to reject the suggestion for rehearing en banc, and Judges Goodwin and Skopil so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

JUDGMENT OF THE
NINTH CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(Filed May 26, 1992)

UNITED STATES OF AMERICA,	)	No. 90-10286
	)	
Plaintiff-Appellee,	)	CT/AG#:
	)	CR-89-1558-HMF
v.	)	
	)	
LARRY BALIDOY BALIGAD,	)	
	)	
Defendant-Appellant.	)	
	)	

APPEAL FROM the United States District Court for the U.S. District Court for the District of Hawaii.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the U.S. District Court for the District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this cause be, and hereby is affirmed.

Filed and entered January 16, 1992